

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS & JOHN

BANCO POPULAR DE PUERTO RICO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 2005-157
	)	
NISKY PHARMACY, INC., ANGEL LUIS	)	
LEBRON a/k/a A. LUIS LEBRON, and	)	
BARBARA W. LEBRON,	)	
	)	
Defendants.	)	
_____	)	

ATTORNEYS:

Justin K. Holcombe, Esq.  
St. Thomas, U.S.V.I.  
*For the plaintiff.*

Nisky Pharmacy, Inc.  
*Pro se defendant.*

Angel Luis Lebron a/k/a A. Luis Lebron  
*Pro se defendant.*

Barbara W. Lebron  
*Pro se defendant.*

ORDER

GÓMEZ, C.J.

The plaintiff in this matter, Banco Popular de Puerto Rico ("Banco Popular"), commenced this debt and foreclosure action in October, 2005, against *pro se* defendants Nisky Pharmacy, Inc., Angel Luis Lebron a/k/a A. Luis Lebron, and Barbara W. Lebron (collectively referred to as the "Defendants"). The record

reflects proof of service of the summons and complaint on each of the Defendants. None of the Defendants filed an answer or otherwise made an appearance in this matter. In December, 2005, Banco Popular moved for entry of default against the Defendants pursuant to Federal Rule of Civil Procedure 55(a).<sup>1</sup> In January, 2006, the Clerk of Court entered defaults against each of the Defendants. Banco Popular now moves for default judgment against the Defendants pursuant to Federal Rule of Civil Procedure 55(b)(2).

Federal Rule of Civil Procedure 55(b)(2) allows courts to enter a default judgment against a properly served defendant who fails to file a timely responsive pleading. *Anchorage Assoc. v. Virgin Is. Bd. of Tax Rev.*, 922 F.2d 168, 177 n.9 (3d Cir. 1990). The rule further provides "no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein." FED. R. CIV. P. 55(b)(2); *Murphy v. C.W.*, 158 Fed. Appx.

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<sup>1</sup> That rule provides:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

393, 396 (3d Cir. 2006) (not precedential). "The entry of a default judgment is largely a matter of judicial discretion, although the Third Circuit has emphasized that such 'discretion is not without limits, however, and we have repeatedly stated our preference that cases be disposed of on the merits whenever practicable.'" *Signs by Tomorrow - USA, Inc. v. G.W. Engel Co.*, 2006 U.S. Dist. LEXIS 56456, No. 05-4353, at \*5-6 (D.N.J. Aug. 1, 2006) (quoting *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984)).

Here, Banco Popular has failed to meet its burden of showing that default judgment is appropriate. In its moving papers, Banco Popular asserts that the Defendants "are not infants, incompetent persons, and are not in the U.S. military service." (Mem. in Supp. of Mot. for Default J. 1.) That assertion makes reference to an exhibit that is included in Banco Popular's moving papers. That exhibit is the signed affirmation of Banco Popular's counsel. That affirmation states that the Defendants are not in the U.S. military, and includes a database search in support of that statement.<sup>2</sup>

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<sup>2</sup> A party moving for default judgment must assert, and provide the necessary facts to support that assertion, that the defaulting party is not in the U.S. military. See 50 U.S.C. app. § 521(b)(1); *Bank of N.S. v. George*, Civ. No. 2004-105, 2008 U.S. Dist. LEXIS 11786, at \*4 (D.V.I. Feb. 15, 2008).

Significantly, however, the affirmation does not state that the Defendants are not infants or incompetent persons. Nor is there evidence anywhere else in Banco Popular's moving papers establishing that the Defendants are not infants or incompetent persons. That deficiency is fatal. See, e.g., *Ross v. Baker*, Civ. No. 06-111, 2006 U.S. Dist. LEXIS 77216, at \*4 (W.D. Mich. Oct. 23, 2006) (denying a default judgment motion where the "[p]laintiffs have not tendered an affidavit stating . . . that the defendant is not an infant or incompetent person").

For the reasons stated above, it is hereby

**ORDERED** that Banco Popular's motion for default judgment is **DENIED** without prejudice. Should Banco Popular re-file its motion accompanied by the necessary evidence, the Court will give its request renewed consideration.

S\\_\_\_\_\_  
**CURTIS V. GÓMEZ**  
**Chief Judge**

**Copies to:** Justin K. Holcombe, Esq.  
Nisky Pharmacy, Inc., *pro se*  
Angel Luis Lebron a/k/a A. Luis Lebron, *pro se*  
Barbara W. Lebron, *pro se*